Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

NANCY JEWELL CROSS, Plaintiff and Appellee, v. MARVIN CHURCH, BOARD OF SUPERVISORS OF SAN MATEO COUNTY, and SAN MATEO COUNTY, Defendants and Appellees)	)	NO. 79-6050

APPEAL FROM THE
SMALL CLAIMS DIVISION, MUNICIPAL COURT,
SOUTHERN JUDICIAL DISTRICT,
COUNTY OF SAN MATEO, STATE OF CALIFORNIA

MOTION TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE UNITED STATES

NANCY JEWELL CROSS,

Plaintiff and Appellee,

v.

MARVIN CHURCH, BOARD OF SUPERVISORS OF SAN MATEO COUNTY, and SAN MATEO COUNTY,

Defendants and Appellees

NO. 79-6050

MOTION TO DISMISS APPEAL

Pursuant to Rule 16 of the Revised Rules of this Court, appellees-respondents MARVIN CHURCH, BOARD OF SUPERVISORS OF SAN MATEO COUNTY, and SAN MATEO COUNTY (hereinafter "the County") move the Court to dismiss this case on the following grounds:

1. The appeal should be dismissed for lack of jurisdiction because it was not filed within 90 days after the entry of judgment.

2. The appeal should be dismissed because it does not present a substantial federal question and the federal question sought to be reviewed was not properly raised.

STATEMENT OF THE CASE

On September 14, 1979, appellant NANCY JEWELL CROSS (hereinafter "Cross") filed a small claims action in the Municipal Court, Southern Judicial District, County of San Mateo, State of California, (NO. SC 60654). Cross sought to recover from the County the sum of $718.02 which included a $618.02 filing fee paid for obtaining nomination papers for the office of County Supervisor and $100.00 for unidentified "expenses". Judgment was entered in favor of the County on September 28, 1979. Cross thereafter attempted to file a motion to vacate, alter, and amend the judgment on October 16, 1979. On October 23, 1979, the Clerk of the Municipal Court advised Cross that the motion would not be calendared because there was no authority for such a motion.

Cross filed her notice of appeal on January 3, 1980. Jurisdiction is asserted under 28 U.S.C. Sections 1257(2), 1257(3), 2101(c), and 2106. Cross has filed a motion to proceed in forma pauperis pursuant to Rule 53 together with the necessary affidavit and her jurisdictional statement. The case was docketed on January 21, 1980.

STATEMENT OF FACTS

Cross was a candidate for the office of Member of the Board of Supervisors, County of San Mateo. A special election was held in the County on November 6, 1979 to fill a vacancy in that office.

Under California Elections Code Section 6553(c)[1], a filing fee of 2 percent of the annual salary for the office of County Supervisor must be paid to the County Clerk by each candidate in order to obtain nomination papers for that office. The filing fee in the present case was $618.02. However, under California Elections Code Section 6555, a candidate may submit a petition containing a prescribed number of registered voters in lieu of a filing fee. In addition, a candidate may submit a combination of such signatures and a pro rata portion of the filing fee in order to obtain nomination papers. California Elections Code Section 6555(b)(3). The number of signatures required to eliminate completely the filing fee in this case was 2,743.

[1]All provisions of the California Elections Code discussed herein are set forth in full in the appendix.

Forms for securing signatures must be made available commencing 45 days before the first day for circulating nomination papers and must be filed not less than 15 days before the time for filing nomination papers. California Elections Code Section 6555(b). In this case, the forms were made available 158 days before the election, or on June 1, 1979, and were required to be filed 103 days before the election, or by July 26, 1979. See California Elections Code Sections 6490 and 6555(b). The record before the Small Claims Court indicates that while Cross obtained the forms for securing signatures in lieu of a filing fee, she never filed them but chose instead to pay the filing fee. She then commenced an action in small claims court to recover the filing fee of $618.02 (plus $100 in unidentified "expenses"). Under California law, the judgment of the small claims court in favor of the County was conclusive upon Cross. California Code of Civil Procedure Section 117.8(a). She has appealed directly to this Court from that judgment, presumably because the small claims judgment was a final judgment.

ARGUMENT

1. The appeal should be dismissed for lack of jurisdiction because it was not filed within 90 days after the entry of judgment.

Rule 16(a) of the Revised Rules of this Court authorizes a motion to dismiss any appeal on the ground that the appeal is not within the jurisdiction of this Court, because not taken in conformity to statute or to these rules. Rule 11(3) provides that an appeal shall be in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the appropriate court within the time allowed by law for taking such appeal. Under 28 U.S.C. 2101(c), any appeal intended to bring any judgment in a civil action before this Court for review [other than those actions specified in 28 U.S.C. 2101(a) and (b)] must be taken within 90 days after the entry of such judgment.

Here, judgment was entered in the small claims court on September 28, 1979. Cross did not file her notice of appeal with the court until January 3, 1980. This was more than 90 days after the entry of judgment and, therefore, Cross's appeal is not timely. Hence, this appeal should be dismissed for lack of jurisdiction under Rule 16(a).

The fact that Cross attempted to file a "Motion to Vacate Judgment" after the entry of judgment does not mean that the ninety-day period commenced running at some later date such as the day the clerk of the court advised Cross that her motion would not be calendared. Proceedings in the small claims division of the California Municipal Courts are governed by the provisions of California Code of Civil Procedure Sections 116 through 117.8. These sections do not authorize a plaintiff in a small claims action to make a motion to vacate the judgment, nor is there any authority in these sections for the court to entertain such a motion. The judgment of the small claims court is conclusive upon the plaintiff. California Code of Civil Procedure Section 117.8(a). There was no authority for Cross's motion, and the filing of that motion should not toll the running of the ninety-day period within which she is required to file her notice of appeal.

This Court has stated that the filing of an untimely petition for rehearing which is not entertained or considered on its merits cannot operate to extend the time for appeal. Bernards v. Johnson (1941), 314 U.S. 19, 31; 62 S. Ct. 30, 86 L. Ed. 11; Bowman v. Loperena (1940), 311 U.S. 262, 266, 61 S. Ct. 201, 85 L. Ed. 177; Wayne Gas Company v. Owens Company (1936), 300 U.S. 131, 137, 57 S. Ct. 382, 81 L. Ed. 557. While these cases involved appeals from district courts sitting in bankruptcy, the principle is equally applicable here. Cross's motion to vacate the judgment was never heard on the merits since the small claims

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court concluded there was no authority for such a motion and never scheduled a hearing. Cross should not be allowed to avoid the requirement of filing her notice of appeal within ninety days from the entry of judgment merely because she filed a motion to vacate the judgment for which there was no authority and on which no hearing was held.

Cross failed to file her notice of appeal within the ninety-day period prescribed by 28 U.S.C. 2101(c) and her appeal should be dismissed for lack of jurisdiction.

2. The appeal should be dismissed because it does not present a substantial federal question and the federal question sought to be reviewed was not properly raised.

The County has considerable difficulty in determining the basis for Cross's appeal in this case. Apparently, Cross contends that California Elections Code Sections 6553 and 6555 are unconstitutional. These sections require candidates for elective offices to pay certain filing fees in order to obtain access to the ballot. However, a candidate may submit a petition containing a specified number of signatures of registered voters in lieu of a filing fee or a combination of such signatures and a pro rata portion of the filing fee.

In Lubin v. Parrish (1974), 415 U.S. 709, this Court held that the California filing fee system in effect at that time was unconstitutional because the law provided no reasonable alternative which would enable an indigent person who was a serious candidate to obtain access to the ballot. However, this Court also recognized the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support. The Court noted that there are obvious and well-known means of testing the "seriousness" of a candidacy other than by payment of a filing fee and expressly stated: " . . . a candidate who establishes that he cannot pay the filing fee

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required for a place on the primary ballot may be required to demonstrate the 'seriousness' of his candidacy by persuading a substantial number of voters to sign a petition in his behalf." (415 U.S. at 718).

In direct response to Lubin, the California Legislature amended the Elections Code to provide that a candidate may submit a petition containing a specified number of signatures of registered voters in lieu of a filing fee. California Elections Code Section 6555. While Cross has not set out verbatim the text of this statute in her jurisdictional statement or in an appendix as required by Rule 15(b)(v), presumably her attack is directed against the constitutionality of the California filing fee procedures of which Section 6555 is an integral part. Cross refers to a number of cases from various jurisdictions, the most relevant being the Lubin case, supra, without any discussion of those cases and their applicability in the instant case. She has apparently included in the appendix copies of the original claim filed in the small claims court and the exhibits to her claim. These materials concern claims by candidates for the refund of filing fees which were paid under the old California filing fee system declared unconstitutional in Lubin. It appears that Cross is either unaware of or chooses to ignore the fact that the California Elections Code was amended following the Lubin case to provide an alternative method for candidates to obtain access to the ballot other than by paying the filing fee.

The constitutionality of California's present filing fee system whereby a candidate may pay the filing fee or submit signatures in lieu of the fee has not yet been ruled on by this Court or the California Supreme Court. However, in Cross v. Fong Eu, 430 F. Supp. 1036 (1977), a California Federal District Court addressed the validity of the new California filing fee

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system in another action brought by Cross. In that case, Cross sought access to the ballot as a candidate for the office of United States Senator. The filing fee for that office was $892.50. In lieu of the fee, Cross could have submitted a petition with 10,000 signatures. The California District Court held that the 10,000 requirement was a reasonable alternative to the filing fee requirement and that, hence, Cross had no constitutional claim against the filing fee under Lubin. And in Bill v. Williams, 70 Cal. App. 3d 531, 139 Cal. Rptr. 19 (1977), a California State Court of Appeal held that a requirement of gathering 1,728 signatures in 55 days from a pool of 25,975 qualified signers did not, standing alone, constitute an unreasonably burdensome or impractical undertaking for a reasonably diligent county supervisorial candidate.

Here, Cross has made no allegations concerning her inability to pay the filing fee for the office of Supervisor and, in fact, she actually paid the fee. She does not allege that she made any attempt whatsoever to gather the necessary signatures that would excuse the filing fee. There is no indication that other candidates who were unable to pay the filing fee or chose not to do so were unable to gather the necessary signatures. Cross does not claim that the period for gathering signatures was excessively short or that the number of signatures required was excessively high.

In short, Cross has failed to allege any facts or even to argue that the California filing fee system fails to provide a reasonable alternative for indigent persons who desire to obtain access to the ballot but who cannot pay the filing fee. The mere broad assertion that the California statutes are unconstitutional without any discussion of the cases cited or the nature and extent of the signature requirements is not a proper method of raising and presenting a federal question.

The County submits that this appeal should be dismissed because it does not present a substantial federal question and the federal question sought to be reviewed has not been properly raised.

CONCLUSION

For the above reasons, the County submits that this appeal should be dismissed because it was not filed within 90 days after the entry of judgment and because it does not present a substantial federal question.

Dated: APR 1 - 1980

KEITH C. SORENSON, District Attorney

By _____
THOMAS F. CASEY, III
Assistant District Attorney

Attorneys for Defendants and Appellees MARVIN CHURCH, BOARD OF SUPERVISORS OF SAN MATEO COUNTY, and SAN MATEO COUNTY

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APPENDIX

California Elections Code Section 6490 provides:

DECLARATION OF CANDIDACY. No candidate's name shall be printed on the ballot to be used at the direct primary unless the following nomination documents are delivered for filing to the county clerk not less than 88 and not more than 113 days prior to the direct primary:

(a) Declaration of candidacy pursuant to Section 6491.

(b) Nomination papers signed by signers pursuant to Section 6494.

The county clerk shall not accept the nomination documents after 5 p.m. on the 88th day prior to the direct primary. Upon the receipt of an executed nomination document, the county clerk shall give the person delivering such document a receipt, properly dated, indicating that the document was delivered to the county clerk.

California Elections Code Section 6553 provides:

AMOUNT OF FEE. The filing fee to be paid to the county clerk for filing a declaration of candidacy for an office to be voted for wholly within one county other than a legislative or congressional office shall be as follows:

(a) No filing fee is required from any candidate for an office for which no fixed compensation is payable, or for which the annual salary is two thousand five hundred dollars ($2,500) or less.

(b) A filing fee of 1 percent of the annual salary of the office shall be paid to the county clerk by each candidate for a judicial office or for the office of district attorney.

(c) A filing fee of 2 percent of the annual salary of the office shall be paid to the county clerk by each candidate for other county offices.

California Elections Code Section 6554 provides:

PAYMENT OF FEES. The filing fees for all candidates required to file declarations of intention to become a candidate shall be paid at the time such declarations are filed with the county clerk. The filing fees for all other candidates shall be paid at the time the candidates obtain their nomination forms from the county clerk. The county clerk shall not accept any papers unless satisfactory evidence is given to the county clerk or to the registrar of voters that such fee has been paid at the time required by this section, or unless satisfactory evidence is given to the county clerk or to the registrar of voters that such fee has been paid at the time of the declaration of candidacy in another county. The county clerk shall transmit the appropriate fees to the Secretary of State at the time he or she delivers the declarations of candidacy for filing. All filing fees received by the Secretary of State and county clerks are nonrefundable.

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California Elections Code Section 6555 provides:

IN-LIEU-FILING-FEE PETITIONS.

(a) Notwithstanding any other provision of this article, a candidate may submit a petition containing signatures of registered voters in lieu of a filing fee as follows:

(1) For the office of California State Assembly, 1,500 signatures.

(2) For the office of California State Senate and the United States House of Representatives, 3,000 signatures.

(3) For candidates running for statewide office, 10,000 signatures.

(4) For all other offices for which a filing fee is required, if the number of registered voters in the district in which he seeks nomination is 2,000 or more, a candidate may submit a petition containing four signatures of registered voters for each dollar of the filing fee, or 10 percent of the total of registered voters in the district in which he seeks nomination, whichever is less.

(5) For all other offices for which a filing fee is required, if the number of registered voters in the district in which he seeks nomination is less than 2,000, a candidate may submit a petition containing four signatures of registered voters for each dollar of the filing fee, or 20 percent of the total of registered voters in the district in which he seeks nomination, whichever is less.

(6) Notwithstanding any other provision of this section, a candidate seeking the nomination of a qualified party with whom he is registered, the registered voters of which who were eligible to vote at the last statewide election constituted less than 5 percent of all registered voters eligible to vote at the last statewide election, may submit a petition containing signatures of 10 percent of the registered voters of that party in the district in which he seeks nomination, or 150 signatures, whichever is less.

(7) A voter may sign both a candidate's nomination papers and his or her in-lieu-filing-fee petition.

(b) Each clerk shall furnish to each candidate, upon request, and without charge therefor, forms for securing signatures. Such forms shall be made available commencing 45 days before the first day for circulating nomination papers. No other form except the form furnished by the county clerk shall be used to secure signatures. The substitution of signatures for fees shall be subject to the following provisions:

(1) Any registered voter may sign an in-lieu-filing-fee petition for any candidate for whom he is eligible to vote.

(2) If a voter signs more candidates' petitions than there are offices to be filled, the voter's signatures shall be valid only on those petitions which, taken in the order they were filed, do not exceed the number of offices to be filled.

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(3) In-lieu-filing-fee petitions shall be filed at least 15 days prior to the close of the nomination period. Upon receipt of the minimum number of in-lieu-filing-fee signatures required, or a sufficient combination of such signatures and pro rata filing fee, the clerk shall issue nomination papers provisionally. Within 10 days after receipt of a petition, the clerk shall notify the candidate of any deficiency. The candidate shall then, prior to the close of the nomination period, either submit a supplemental petition, or pay a pro rata portion of the filing fee, to cover the deficiency.

(4) If the petition is circulated for an office in more than one county, the candidate shall submit the signatures to the county clerk in the county in which the petition was circulated. The county clerk shall at least two days after verifying the signatures on the petition, notify the Secretary of State of the total number of valid signatures. If the number of signatures is insufficient, the Secretary of State shall notify the candidate and the county clerks of the fact. The candidate may submit the necessary number of valid signatures at any time prior to the close of the period for circulating nomination papers. Each circulator of an in-lieu-filing-fee petition shall have the qualifications required under Section 42.

(5) Each candidate may submit a greater number of signatures to allow for subsequent losses due to invalidity of some signatures. The clerk shall not be required to determine the validity of a greater number of signatures than that required by this section.

(c) For the purposes of this section, the requisite number of signatures shall be computed from the latest registration figures forwarded to the Secretary of State pursuant to Section 607.

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PROOF OF SERVICE BY MAIL

ACTION NO. 79-6050

I am a citizen of the United States and a resident of the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within action. My business address is Hall of Justice and Records, Redwood City, California.

On April 1 , 1980 I served the within

MOTION TO DISMISS APPEAL

on the following parties

in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States post office mail box at Redwood City, California, addressed as follows:

NANCY JEWELL CROSS
1902 Palo Alto Way
Menlo Park, California 94025

I certify under penalty of perjury that the foregoing is true and correct.

Dated: April 1 , 1980.

David E. Johnson